Supreme Court, U.S.
FILED
071052 JAN 14 2008
OFFICE OF THE CLERK

No._____

In The
Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

FERNANDO GARCIA,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

GREG ABBOTT
Attorney General of Texas

GENA BUNN
Chief, Postconviction
Litigation Division

KENT C. SULLIVAN
First Assistant
Attorney General

* FREDERICKA SARGENT
Assistant Attorney General
Postconviction Litigation Division

ERIC J. R. NICHOLS
Deputy Attorney Attorney
For Criminal Justice

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400

* Counsel of Record

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

APPENDIX III
Findings, Conclusions And Recommendation
of The United States Magistrate Judge
(September 17, 2003)

APPENDIX IV
Order
(October 6, 2003)

APPENDIX V
Judgment
(October 6, 2003)

APPENDIX VI
Certificate As To Appealability
(January 20, 2004)

APPENDIX III

FILED September 17, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FERNANDO GARCIA,	§	
Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. 3-01-CV-580-G
	§	
DOUG DRETKE,	§	
Director, Texas	§	
Department of Criminal	§	
Justice Criminal	§	
Institutions Division,[1]	§	
Respondent.	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b), and an Order of the District Court in implementation thereof, the subject cause has previously been referred to the United States. Magistrate Judge. The findings, conclusions, and recommendation of the magistrate judge, as evidenced by his signature thereto, are as follows:

---

[1] The "Institutional Division" of the Texas Department of Criminal Justice was recently renamed the "Correctional Institutions Division." Additionally, the previous named respondent in this action was Janie Cockrell. On August 18,2003, Doug Dretke succeeded Cockrell as Director of the Correctional Institutions Division. Under Rule 25(d)(l) of the Federal Rules of Civil Procedure, he "is automatically substituted as a party."

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for a writ of habeas corpus filed by a state inmate pursuant to 28 U.S.C.§ 2254.

Parties: Petitioner Fernando Garcia ("Petitioner" and "Garcia") is an inmate confined in the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-CID) awaiting execution which was imposed as punishment for the offense of capital murder. Respondent is the Director of the TDCJ-CID.

Statement of the Case: Petitioner was convicted ofcapital murder and sentenced to death. *State v. Garcia*, No. F-89-96959-M (194th Judicial Dist. Ct., Dallas, Texas, December 8, 1989). His conviction and sentence were affirmed on direct appeal. *Garcia v. State*, 887 S.W.2d 846 (Tex. Crim. App. 1994). Petitioner filed a petition for writ of certiorari in the United States Supreme Court which was denied. *Garcia v. Texas*, 514 U.S. 1005, 115 S. Ct. 1317 (1995). Petitioner subsequently filed an application for writ of habeas corpus in state court which was denied. *Ex parte Garcia*, No. 45,875-01 (Tex. Crim. App. 2001)(unpublished). The present petition was filed in this court on June 5, 2001. Because the disposition of one of the claims raised therein is informed by the recent opinion in *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir.)(*en banc*), the recommendation in this case was deferred until the petition for writ of certiorari *in Robertson* was denied on August 15, 2003, _U.S. _,71 U.S.L.W. 3760,2003 WL 21313845.

Statement of Facts: As noted by the Texas Court of Criminal Appeals in Petitioner's direct appeal, "[t]he victim, three-year-old Veronica Rodriguez, was discovered missing sometime around 2:00 a.m. on Sunday, August

30, 1987, when her mother, Debbie Rodriguez, returned from an evening out with friends." *Garcia v. State*, 887 S.W.2d at 849. She was found the next day "wrapped in a blanket under appellant's bed next to a wall of the garage" where Petitioner lived, adjacent to the victim's house. *Id.* at 850. "She had been sexually assaulted, beaten, and strangled." *Id.* [P]hotographs of the deceased taken prior to autopsy showing bite marks and bruises ...." *Id.* n.7.

Petitioner does not direct any of his five claims for federal habeas corpus relief to the guilt phase of his trial. Rather, he complains of the trial court's sentencing instructions to the jury and the lack of appellate review of mitigation evidence in the punishment phase of his trial. Respondent's answer observes that Petitioner failed to exhaust his fifth claim for relief but does not seek dismissal for failure to exhaust, instead contending that such claim is procedurally barred and without merit. (Answer at 7.)

Findings and Conclusions: As a threshold matter, Respondent asserts that Petitioner's second and fifth claims for relief are procedurally barred. Federal courts will not consider the merits of a claim resolved by a state court judgment which contains a plain statement that the decision rests upon an independent and adequate state law ground. *See Lee v. Kemna*, 534 U.S. 362,375,122 S. Ct. 877, 885 (2002); *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991); *Michigan v. Long*, 463 U.S. 1032, 1041-42, 103 S. Ct. 3469, 3477 (1983). Therefore, the court addresses these issues first.

To constitute a bar federal review, a state law procedural bar must be "firmly established and regularly followed" at the time that it was violated, *see Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 857 (1991), and the state court's application of the procedural rule

must not otherwise be exorbitant. *See Lee v. Kemna*, 534 U.S. at 376, 122 S. Ct. at 885. When a state prisoner's claims have been found to be procedurally barred by a state court, merits consideration is barred in a § 2254 petition unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged constitutional violation, or establish that imposition of a procedural bar would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. at 750, 111 S. Ct. at 2565.

In his second claim, Garcia contends that the Texas death penalty statute was applied in violation of his rights under the Eighth and Fourteenth Amendment, because the Texas Court of Criminal Appeals on direct appeal refused to review the sufficiency of the evidence mitigating against a death sentence. (Petition at 8-9.) Respondent asserts the defense that the state habeas court denied this claim on the state law basis that Petitioner procedurally defaulted it by failing to raise it on direct appeal. (Answer at 15-16.) The trial court found in the context of its habeas review that such claim was not properly before the court because Petitioner did not make a specific request in his direct appeal for the Court of Criminal Appeals to review the sufficiency of any alleged mitigating evidence. (State habeas finding, "SHF," No.8; State habeas record, "SHR," at 101). Petitioner has not established an excuse for his procedural default, or shown that application of a procedural bar would result in a fundamental miscarriage of justice. *See Coleman v. Thompson, supra; Stokes v. Anderson*, 123 F.3d 858, 859 (5th Cir. 1997). The magistrate judge finds that Petitioner's second claim is

barred by procedural default.[2]

In Petitioner's fifth claim, he alleges that the Texas death penalty statute is unconstitutional because it prevents the jury from being instructed that a single "holdout juror" could result in the imposition of a life sentence. (petition at 14.) Respondent points out that this claim was never presented to the state courts, and is therefore unexhausted. Because Texas would preclude a successive state habeas claim, the claim is procedurally defaulted for failure to exhaust. *See Beazley v. Johnson*, 242 F.3d 248, 264 (5th Cir.) (citing *Coleman v. Thompson*, 501 U.S. at 735 n. 1, 111 S. Ct. at 2557 n. 1), *cert. denied*, 534 U.S. 945, 122 S. Ct. 329 (2001)). Again, petitioner has not shown that this state law limitation is inadequate, nor has he provided an excuse for his procedural default. The court finds that petitioner's fifth claim is barred by procedural default.[3] The remaining claims will be considered on the merits.

The standard of review in federal habeas proceedings is governed by the Antiterrorism and Effective Death Penalty Act of1996 ("AEDPA"), 28 U.S.C. §2254(d), which

---

[2] Alternatively, were the court to find that this claim is not procedurally barred, it should be denied on its merits. The Constitution does not require independent consideration on direct appeal of mitigating circumstances. *Hughes v. Johnson*, 191 F.3d 607,622-24 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145, 120 S. Ct. 1003 (2000).

[3] In the event that this claim was not barred on this basis, it should be denied on alternative grounds. Since the rule that Petitioner proposes has never been required by the Constitution, this claim violates the federal non-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and lacks merit. *See Alexander v. Johnson*, 211 F. 3d 895,897-98 (5thCir. 2000); *Webb v. Collins*, 2 F. 3d 93, 9596 (5th Cir. 1993).

provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

28 U.S.C. § 2254(d) (2000). Since the petition in this case was filed after April 24, 1996, the above cited provision of the AEDPA applies to those claims which were adjudicated on the merits. *Lindh v. Murphy*, 521 U.S. 320, 326-27, 117 S. Ct. 2059,2063 (1997). "Resolution on the merits" in the habeas corpus context is a term of art that refers to the state court's disposition of the case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997).

Section 2254(d)(1) concerns pure questions of law as well as mixed questions of law and fact. *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885, 122 S. Ct. 194 (2001). Under the "contrary to" clause, a federal habeas court may grant the writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case

differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362,412-3, 120 S. Ct. 1495, 1523 (2000). With respect to the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* Under *Williams*, a state court unreasonably applies Supreme Court precedent if it "unreasonably extends a legal precedent from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* Section 2254(d)(2) concerns questions off act. *See Moore v. Johnson*, 225 F.3d 495, 501, 504 (5th Cir. 2000), *cert. denied*, 532 U.S. 949, 121 S. Ct. 1420 (2001). Under § 2254(d)(2), federal courts must give deference to state court findings unless they were "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Chambers v. Johnson*, 218 F.3d 360,363 (5th Cir.) (as modified on denial of rehearing), *cert. denied*, 531 U.S. 1002, 121 S. Ct. 508 (2000). The resolution of actual issues by the state court is presumptively correct and will not be disturbed unless the prisoner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In his first claim for relief, Petitioner contends that the instructions given to the jury in the punishment stage of the trial prevented the jury from effectively responding to or making use of the mitigation evidence produced during trial. This claim relies upon the rule set forth in *Penry v. Lynaugh*, 492 U.S. 302, 322, 109 S. Ct. 2934,2948 (1989) ("*Penry I*"), and *Penry v. Johnson*, 532

U.S. 782. 797. 121 S. Ct. 1910. 1920 (2001) ("*Penry II*"). In *Penry I*, the Supreme Court held that the two special issues provided to the jury in the punishment phase of a Texas capital murder trial were inadequate to give effect to mitigating evidence admitted before the sentencing jury of Penry's mental retardation and severe child abuse. 492 U.S. at 322. 109 S. Ct. at 2948. Because the Texas Legislature had not amended the Texas capital murder statute prior to Garcia's trial, the trial court inserted an additional instruction concerning mitigation evidence, as follows:

> You are instructed that you shall consider any evidence which, in your opinion, mitigates against the imposition of the death penalty. In making this determination you shall consider any aspects of the defendant's background, character or record and the facts and circumstances of the offense. If you believe from the evidence that the State has proven beyond a reasonable doubt that the answers to the Special Issues are "Yes." but you are further persuaded by the mitigating evidence that the defendant should not be sentenced to death in this case. or you have a reasonable doubt as to whether the death penalty should be imposed against the defendant, then you shall answer one or both of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed in this case.
>
> Mitigating circumstances are circumstances which do not constitute a justification or excuse for the offense in question. but which. in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.

(State clerk's trial record. "Tr.," at 199-200.) This form of instruction was expressly disapproved in *Penry II.* 532 U.S. at 798-800, 121 S. Ct. at 1921-22.

However, since petitioner was not entitled to a special mitigation instruction, the mere inclusion of this supplemental instruction does not entitled him to habeas corpus relief. "In the, absence of *Penry*-quality mitigating evidence, the presentation of this instruction does not constitute error of any sort." *Robertson v. Cockrell,* 325 F.3d at 257. In order to determine what constitutes *Penry*-quality or constitutionally relevant mitigating evidence entitling a capital murder defendant to a special mitigation instruction. the evidence must show that the criminal act was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own." *Robertson,* 325 F.3d at 251 (quoting *Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir. 1992)(*en banc*), *aff'd,* 506 U.S. 461, 113 S. Ct. 892 (1993).

Petitioner claims that the sexual assault and murder of the three-year-old girl in this case was due to his pedophilia resulting from sexual abuse he received as a child. However, pedophilia has never been held to be the type of uniquely severe permanent handicap requiring a special mitigation instruction."[4] In fact, his own expert testified during the punishment stage of his trial that Petitioner "had no evidence of any kind of mental illness

---

[4] In *Bigby v. Cockrell,* 340 F.3d 259 (5th Cir. 2003), *pet. for rehearing en banc filed* (Aug. 8, 2003)(No. 99-11262), the Fifth Circuit Court of Appeals recently invalidated a case involving a similar nullification instruction by expanding the categories of constitutionally relevant mitigating evidence to include chronic paranoid schizophrenia. In light of the other factors present, the ruling in *Bigby* does not authorize a further expansion on account of Petitioner's pedophilia. Therefore, it does not change the outcome of this case.

or psychosis. He has a ... personality disorder of mixed variety, which basically means a long standing pattern of behavior traits and attitudes that cause some maladjustment in life. And he's what we classically call a pedophile, pedophilia." (SOF XXI at 2861). Further, the special instruction concerning future dangerousness allowed a vehicle for the jury to give effect to this evidence, since he would presumably have no contact with children while serving his life sentence in prison.[5] In fact, this was the precise defensive theory that Garcia's attorneys elicited from both the prosecution's expert (SOF XXI at 2807) and his own expert (SOF XXI at 2869, 2871, 2882), which they emphasized in closing argument. (SOF XXI at 2921-22.) Finally, Petitioner alleges that the evidence admitted before the jury at the punishment phase of this trial shows that his own "substance abuse was clearly a precipitating factor to his behavior." (Petition at 7; SOF 21 at 2869, 2871; SOF 21 at 2853). A defendant's use of illegal drugs or the abuse of legal drugs does not constitute a permanent handicap which occurred through no fault of his own. *See Cordova v. Collins*, 953 F.2d 167, 170 (5th Cir. 1992). Therefore, Petitioner's first claim for relief should be denied.

In his third claim for relief, Petitioner contends that he was denied the effective assistance of counsel on direct appeal because his lawyers failed to raise certain issues

---

[5] The second special issue submitted to the jury asked "[i]s there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" (Tr. at 199.) The instructions also provided that in the event of a negative answer to any special issue "the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life." (*Id.* at 200.)

that would have resulted in a new trial or reduced punishment. In particular, petitioner complains that the performance of his state appellate counsel was deficient in failing to request that the Texas Court of Criminal Appeals independently review the mitigation evidence to determine the appropriateness of the jury's implied negative response to the mitigation evidence. Appellate counsel's performance on appeal is judged under the two-pronged standard set forth *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052,2070 (1984). *See Smith v. Robbins*, 528 U.S. 259,285-86, 120 S. Ct. 746, 764 (2000); *Briseno v. Cockrell*, 274 F.3d 204,207 (5th Cir. 2001). The first prong of *Strickland* requires a showing of deficient performance, *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. To prove deficiency, a defendant "must show that counsel's performance fell below an objective standard of reasonableness." *Id.* This requires a showing that the errors made by his counsel were so serious that such counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* Petitioner must show that the performance ofhis appellate counsel was deficient in an objectively unreasonable manner. *Robbins*, 528 U.S. at 285, 120 S. Ct. at 764. Further, "[t]he Constitution does not require appellate counsel to raise every nonfrivolous ground that might be pressed on appeal." *Ellis v. Lynaugh*, 873 F.2d 830,840 (5th Cir.), *cert. denied*, 493 U.S. 970, 110 S. Ct. 419 (1989). Instead, appellate counsel should winnow out "weaker arguments on appeal" and focus on "one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983) (holding that judges should not second-guess reasonable professional judgments and impose a duty on appointed counsel to raise every colorable claim suggested by a client).

The second prong of this test requires a showing of

prejudice by demonstrating that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.[6] *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A habeas petitioner must not show merely that the result would have been different if his attorney had taken a different action, but also that the result of the proceeding was fundamentally unreliable or unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S. Ct. 838, 842 (1993). Regarding appellate representation, a habeas petitioner must "show a reasonable probability that, but for his counsel's unreasonable failure ... he would have prevailed on his appeal." *Briseno*, 274 F.3d at 207 (citing *Smith*, 528 U.S. at 285, 120 S. Ct. at 764). The court need not address both prongs of the *Strickland* standard if the complainant has made an insufficient showing on one. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. Under this standard, petitioner's complaint should be denied.

Petitioner's appellate counsel raised 26 points of error, including stronger grounds than the one suggested in his third claim. Therefore, Petitioner has not shown that the conduct of his appellate counsel was anything other than a reasonable appellate strategy to limit his appeal to the stronger issues. But even if it were deficient, Petitioner has failed to demonstrate a reasonable probability that this issue would have prevailed on his direct appeal. In fact, the evidence shown in the state record filed in this petition supports the "implied negative response" to the

---

[6] A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

mitigation evidence.[7] Therefore, Petitioner has failed to

---

[7] The facts of the offense are particularly heinous. The three-year-old victim was the daughter of the people that befriended Petitioner, got him a job, and provided him a place to live. (SOF XIX at 2508-12.) While her family slept close by, she was kidnaped from her bedroom, bitten in at least 13 places on her body, and sexually assaulted so violently that her birth canal was torn from front to back. (SOF XVIII at 2383-86, 2407-09,2416-17,2421; SOF XIX at 2465-66,2486,2500-01,2520,2522; SOF XX at 2652-53, 2657-66). Afterwards, the small child was strangled by the neck for five to six minutes causing her death, followed by blunt-force trauma capable of causing her death. (SOF XVIII at 2401-07,2409-12,2437.) Her body was found stuffed under Petitioner's mattress, concealed in one of his bed sheets. (SOF XVIII at 2354-56,236869,2379-80.)

Petitioner's I.Q. of 110, talent, and background provided little in the way of mitigation. (SOF XXI at 2787, 2876.) His father died when he was very young, and he claimed that he was abandoned by his mother (SOF XXI at 2861) and raised by his elderly grandmother. (SOF XXI at 2785,2861.) He also told his court-appointed psychologist that he had been sexually abused as a child. (SOF XXI at 2861-62). He dropped out of school at the tenth grade (SOF XXI at 2785), abused substances (SOF XXI at 2785-86), and was arrested for theft as a juvenile. (SOF XXI at 2786). He also offered evidence that he was a good employee. (SOF XXI at 2885.) The evidence also showed that he had committed other offenses involving violence and sexual assault. He sexually assaulted his girlfriend's five-year-old daughter, and physically abused his girlfriend and her eight-year-old son. (SOF XXI at 2825-28, 2835-37, 2840-42.) He has been convicted of sexual assault and burglary of a habitation. (SOF XX at 2706-13,2724-28.) He told his court appointed psychologist that he did not remember much about the instant offense except that he remembered being on top of the victim and then waking up with her in the bed and putting her under the bed. (SOF XXI at 2876.)

Petitioner's defensive theory presented in the punishment phase did not emphasize mitigation, but rather lack of deliberation and future danger. Arguably the evidence in the punishment phase showed an absence of deliberateness since Garcia was intoxicated at the time. (SOF

satisfy either prong of the *Strickland* test, and this claim should be denied.

In his fourth claim for relief, Petitioner contends that the trial court's refusal to define a life sentence in the instructions to the jury deprived him of his rights under the Eighth and Fourteenth Amendments to an individualized assessment of the appropriateness of the death penalty. Although no authority is cited in support of this proposition, this argument appears to be an extension of *Simmons v. South Carolina*, 512 U.S. 154, 161-62, 114 S. Ct. 2187, 2193 (1994), and *Shafer v. South Carolina*, 532 U.S. 36, 121 S. Ct. 1263 (2001), wherein the Supreme Court has held that such an instruction is necessary when one of the options to the death penalty is life without parole. However, Texas does not authorize a sentence of life without the possibility of parole. *See Collier v. Cockrell*, 300 F.3d 577, 583 (5th Cir. 2002), *cert. denied*, 537 U.S. 1084, 123 S. Ct. 690 (2002). Therefore, such an extension would violate the non-retroactivity doctrine of *Teague*. *See Id.*; *Woods v. Cockrell*, 307 F.3d 353, 361-62 (5th Cir. 2002). Moreover, even if this claim were not *Teague*-barred, the fact that this Circuit has

---

XX at 2746, 2750; SOF XXI at 2777,2778-79,2799-2801,2853-54,2865,2868,2876). Evidence also suggested that he would not be a future danger to society if given a life sentence in prison, based upon expert testimony from his own expert as well as the expert for the State that Petitioner, as a pedophile, would only be dangerous to children and not to other adults. (SOF XXI at 2807, 2861, 2871,2882.) Because of the emotional nature of the state's case (SOF XXI at 2913-14), his attorney's closing argument sought to encourage a logical rather than emotional view of the evidence (SOF XXI 2913-20), avoiding passion and sympathy (SOF XXI at 2920), and instead emphasizing evidence showing a lack of deliberateness (SOF XXI at 2919-21), and that if sent back to prison for life Petitioner would commit no criminal acts of violence. (SOF XXI at 2921-22).

refused to apply *Simmons* and *Shafer* to the Texas capital offense punishment scheme forecloses any argument that the Texas Court of Criminal Appeals' rejection of this claim applied Supreme Court precedents in an objectively unreasonable manner.

Conclusion: Although the magistrate judge has examined Garcia's claims which were decided by the Texas Court of Criminal Appeals on the merits in a fashion akin to de novo, independent review on matters of law, the Supreme Court has recently made clear in *Price v. Vincent*, _U.S._, 123 S. Ct. 1848, 1853-54 (2003), that relief is unavailable to a § 2254 petitioner absent a showing that the state court applied decisions of the Supreme Court in an objectively unreasonable manner. Garcia has not discharged this burden.

RECOMMENDATION:

For the foregoing reasons it is recommended that the petition for a writ of habeas corpus be denied.

A copy of this recommendation shall be transmitted to counsel for the parties.

DATED: September 16th, 2003.

s/ Wm F. Sanderson, Jr.
WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE

In the event that a party wishes to object to this recommendation, you are hereby notified that you must file your written objections within ten (10) days after being served with a copy of this recommendation. Pursuant to *Douglass v. United States Services Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996 (*en banc*) a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten day period may bar a de novo determination by the district judge of any findings of fact or conclusions of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

APPENDIX IV

FILED October 6, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FERNANDO GARCIA	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 3-01-CV-580-G
	)	
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Criminal Institutions Division	)	

ORDER

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the findings, conclusions and recommendation of the United States Magistrate Judge are adopted.

SIGNED this 6, day of October, 2003.

s/ A. Joe Fish
A. JOE FISH
UNITED STATES DISTRICT JUDGE

APPENDIX V

FILED October 6, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FERNANDO GARCIA	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 3-01-CV-580-G
	)	
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Criminal Institutions Division	)	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered, It is ORDERED, ADJUDGED AND DECREED that the petition be, and it is hereby, denied and dismissed.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy ofthis judgment and the order adopting the Findings, Conclusions and Recommendation ofthe United States Magistrate Judge, to counsel for the parties.

SIGNED this 6, day of October,2003.

s/ A. Joe Fish
A. JOE FISH
UNITED STATES DISTRICT JUDGE

APPENDIX VI

FILED January 20, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FERNANDO GARCIA, *Petitioner,*	)	
v.	)	CIVIL ACTION
	)	NO. 3-01-CV-580-G
DOUG DRETKE, Director, Texas Department of Criminal Justice, Criminal Institutions Division, *Respondent.*	)	

CERTIFICATE AS TO APPEALABILITY

A Notice of Appeal has been filed in the above captioned action in which:

(X) the District Court has entered a final order in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254.

( ) the District Court has entered a final order in a proceeding pursuant to 28 U.S.C. § 2255.

Pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), the undersigned Magistrate Judge finds and recommends as follows:

IFP STATUS:

(X) the party appealing should be GRANTED leave to proceed informa pauperis.

( ) the party appealing is proceeding in forma pauperis.

( ) the party appealing should be DENIED leave to proceed in forma pauperis for the following reason(s):

( ) the Court recommends that the District Court certify, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915(a)(3), that the appeal is not taken in good faith;

( ) the person appealing is not a pauper because he has paid the appellate filing fee;

( ) the person appealing has not complied with the requirements of Rule 24 ofthe Federal Rules of Appellate Procedure and/or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order entered on _____).

COA:

(X) a Certificate of Appealability should be GRANTED in part. (See reasons set forth below).

(X) a Certificate of Appealability should be DENIED in part. (See reasons stated below).

REASONS: A Certificate of Appealability should be GRANTED on the following issue: Petitioner's first claim for relief asserting that the trial court violated petitioner's federal constitutional rights under the Eighth and Fourteenth Amendments by charging the jury with a "nullification" instruction which failed to give effect to petitioner's mitigation evidence. See, e.g., *Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002), *cert. granted*, _ U. S. _, 124 S.Ct. 46, 156 L.Ed.2d 703 (2003). A Certificate of Appealability should be DENIED on all other issues. The Court hereby incorporates by reference the Findings and Recommendation of the United States

Magistrate Judge, entered on September 17,2003, adopted by the District Court on October 6, 2003, in support of it s finding that Petitioner has failed to make a substantial showing of the denial of a federal constitutional right on all other issues. *See Slack v, McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1602, 146 L. Ed .2d 542 (2000) (holding that a substantial showing of the denial of a federal constitutional right is established by demonstrating either that jurists of reason could disagree with the district court's resolution of a claim or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further); see also *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d931 (2003).

SIGNED this 20th day of January, 2004.

s/ Wm. F. Sanderson, Jr.
WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

ORDER OF THE COURT
ON THE FOREGOING RECOMMENDATION

Considering the record in this case and the above recommendation, and pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253 (c), the Court hereby finds and orders:

IFP STATUS:

(X) the party appealing is GRANTED in forma pauperis status on appeal.
( ) the party appealing is proceeding in forma pauperis.

( ) the party appealing is DENIED informa pauperis status on appeal.
for the following reasons:

( ) the Court certifies, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915 (a)(3), that the appeal is not taken in good faith. In support of this finding, the Court adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation entered in this case on. Based upon the Magistrate Judge's findings, this Court finds that the appeal presents no legal points of arguable merit and is therefore frivolous. See *Harkins v. Roberts*, 935 F. Supp. 871, 873 (S. D. Miss. 1996) (citing *Howard v. King*, 707 F. 2d 215,219-20 (5th Cir. 1983)).

( ) the person appealing is not a pauper;

( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and / or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order entered on).

COA:

(X) a Certificate of Appealability is GRANTED in part on the following issue: Petitioner's first claim for relief asserting that the trial court violated petitioner's federal constitutional rights under the Eighth and Fourteenth Amendments by charging the jury with a "nullification" instruction which

failed to give effect to petitioner's mitigation evidence.

(X) a Certificate of Appealability is DENIED in part on all other issues. The Court hereby adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation entered in this case on September 17,2003, in support of its finding that Petitioner has failed to make a substantial showing of the denial of a federal constitutional right. See *Slack v. Mclianiel*, 529 U.S. 473, 120 S. Ct. 1595, 1602, 146 L. Ed .2d 542 (2000).

SIGNED this 20, day of January, 2004.

s/ A. Joe Fish
A. JOE FISH
UNITED STATES DISTRICT JUDGE